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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF NEW YORK,

Petitioner,

-against-

GEORGE MOONEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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November 27, 2000

7688

QUESTION PRESENTED

By holding that a maritime worker's receipt of a formal award from the Workers' Compensation Board will constitute a waiver of his federal Jones Act remedy only when that award "substantially exceeds interim benefits during a period of unemployment," did the United States Court of Appeals for the Second Circuit improperly render New York State Workers' Compensation Law section 113 a nullity by creating an unworkable standard which would eliminate waiver of Jones Act claims by injured maritime workers who receive formal New York State Workers' Compensation awards, in that the Workers' Compensation Board does not have the power to award benefits that "substantially exceed interim benefits during a period of unemployment?"

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No.

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Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals For the Second Circuit

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit, from which petitioner seeks certiorari, was entered on May 22, 2000. The original opinion of the Second Circuit was entered on May 22, 2000 but was withdrawn. That withdrawal is reported at 213 F.3d 65, 2000 U.S. App. LEXIS 11384 and appears in the Appendix at A32. The original opinion, as corrected, appears in the Appendix at A18-31.[1] The opinion was

[1] The version of the Second Circuit's original opinion, dated May 22, 2000, printed in the Appendix at A18-31, contains the changes as indicated in the Court's errata sheet filed June 2, 2000. A copy of the errata sheet appears in the Appendix at A50-51.

amended on June 28, 2000. It is reported at 219 F.3d 123, 2000 U.S. App. LEXIS 22168 and appears in the Appendix, as corrected, at A1-17.[2] Petitioner filed a petition for rehearing from the original May 22, 2000 opinion. The Second Circuit denied this petition for rehearing in light of its aforementioned amended opinion. The denial of the petition for rehearing was entered on June 28, 2000. That order is not reported. It appears in the Appendix at A44-45. Petitioner filed a petition for rehearing from the June 28, 2000 amended opinion. The Second Circuit's denial of this petition for rehearing was entered September 11, 2000. That order is also not reported. It appears in the Appendix at A46-47. The August 2, 1999 Memorandum and Order (one paper) of the United States District Court for the Southern District of New York is not reported and appears in the Appendix at A33-36. The District Court's August 25, 1999 Memorandum and Order (one paper) granting reconsideration appears at 1999 U.S. Dist. LEXIS 21789 and appears in the Appendix at A37-41.

JURISDICTION

The Second Circuit issued its judgment on May 22, 2000. The Second Circuit issued an order denying rehearing on September 11, 2000 (A46-47). This Court has jurisdiction to review this judgment under 28 U.S.C. § 1254.

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[2] The version of the Second Circuit's amended opinion, dated June 28, 2000, printed in the Appendix at A1-17, contains the corrections as indicated in the Court's errata sheet filed on or about August 22, 2000. A copy of the errata sheet appears in the Appendix at A48-49.

STATUTORY PROVISIONS

46 U.S.C. § 688. Recovery for injury to or death of seaman (the Jones Act).

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

New York State Workers' Compensation Law

Section 15(3)(v). Additional compensation for impairment of wage earning capacity in certain permanent partial disabilities. Notwithstanding any other provision of this subdivision, additional compensation shall be payable for impairment of wage earning capacity for any period after the termination of an award under paragraphs a, b, c, or d, of this subdivision for the loss or loss of use of fifty per centum or more of a member, provided such impairment of earning capacity shall be due solely thereto. Such additional compensation shall be determined in accordance with paragraph w of

this subdivision. The additional compensation shall be reduced by fifty per centum of any amount of disability benefits which the disabled employee is receiving or entitled to receive for the same period under the social security act, and shall cease on the date the disabled employee receives or is entitled to receive old-age insurance benefits under the social security act. As soon as practicable after the injury, the worker shall be required to participate in a board approved rehabilitation program; or shall have demonstrated cooperation with efforts to institute such a board approved program and shall have been determined by the board not to be a feasible candidate for rehabilitation; such rehabilitation shall constitute treatment and care as provided in this chapter.

Section (5-b). Non-schedule adjustments. Notwithstanding any other provision of this chapter, in any case coming within the provisions of subdivisions three or five of this section, in which the right to compensation has been established and compensation has been paid for not less than three months, in which the continuance of disability and of future earning capacity cannot be ascertained with reasonable certainty, the board may, in the interest of justice, approve a non-schedule adjustment agreed to between the claimant and the employer or his insurance carrier. The board shall require, before approving any such agreement, that there be an examination of the claimant in accordance with section nineteen of this chapter, and such approval shall only be given when it is found that the adjustment is fair and in the best interest of the claimant. The board may, in such case, order all future compensation to be paid in one or more lump sums or periodically, and any such

adjustment shall be regarded as a closing of the claim unless the board find upon proof that there has been a change in condition or in the degree of disability of claimant not found in the medical evidence and, therefore, not contemplated at the time of the adjustment.

§ 113. Interstate commerce. The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by congress of the United States only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate, commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter.

STATEMENT OF THE CASE

A. Nature of Case

George Mooney ("Mooney"), who worked on the ferry John F. Kennedy owned by the City of New York ("the City"), commenced this personal injury action on January 4, 1999 under 46 U.S.C. § 688 and general maritime law for injuries allegedly sustained while descending stairs during a fire drill on May 16, 1996. Mooney alleged that the negligence of the City, including the boat's unsafe and unseaworthy condition, was the cause

of his injuries. Mooney also alleged entitlement to maintenance and cure.

B. Statement of Relevant Facts

On May 16, 1996, Mooney reported to his employer, the New York City Department of Transportation, that he was injured while descending stairs during an unannounced fire drill on a ferry on which he worked as a marine engineer. On a Report of Injury form, Mooney advised his employer that "in responding to a (*sic*) unannounced, spontaneous fire drill, I was injured. I wrenched my knee and threw my back out while coming down the E.R. [engine room] stairs."

In June 1996, Mooney applied for New York State Workers' Compensation benefits with the assistance of counsel. Thereafter, on June 27, 1996, the City advised the Workers' Compensation Board ("the Board") that Mooney's right to compensation benefits would not be controverted, but that payments had not yet commenced, because Mooney's submission of prima facie medical evidence was still pending.

Mooney began receiving compensation benefits in November 1996. In December 1996, payments were suspended, because Mooney failed to supply up-to-date medical evidence. Consequently, on December 23, 1996, Mooney was examined by a doctor for the Workers' Compensation Division of the New York City Law Department who found no permanent disability.

On January 14, 1997, the first hearing involving Mooney's Workers' Compensation claim was held before Workers' Compensation Law Judge ("WCLJ") Finkelstein. Mooney appeared with his counsel and the City was represented by private counsel. Following the hearing, the WCLJ issued a decision awarding Mooney the maximum rate of $400.00 per week from May 17, 1996 to September

8, 1996, less two days which he worked; and $400.00 per week from September 8, 1996 to January 15, 1997. Mooney's employer was to then continue payments at $400.00 per week. The case was "continued" for three months, at which time both sides were to produce current medical evidence, as the issue to be further determined was whether the injuries were related to the incident.

Mooney returned to work on February 28, 1997. On March 28, 1997, Mooney was advised, on a form that indicated that his compensation benefits had been paid in full, that his benefits were modified, because he had returned to work and received an overpayment of benefits from February 28, 1997 through March 30, 1997. Thus, Mooney's revised payments totalled $16,400.00 from May 17, 1996 until February 28, 1997.

On May 22, 1997, the second Workers' Compensation hearing was held at which the WCLJ awarded Mooney $400.00 per week from January 15, 1997 until February 28, 1997, and upheld the suspended payments beginning on February 28, 1997, the date Mooney had returned to work. The WCLJ authorized an orthopedic consultation and "continued" the case.

On May 30, 1997, Mooney received another confirmation that his compensation benefits were modified, because he was overpaid from February 28, 1997, his return to work, through March 2, 1997. Again, this form indicated that compensation had been paid in full.

On December 11, 1997, the third hearing was held at which the question of the permanency of Mooney's injuries was explored in addition to the issues of Mooney's average weekly wage, the appropriate rate of compensation and whether additional benefits should be paid. No award was made, but the WCLJ authorized a bone scan to the left leg and "continued" the case yet again.

On April 30, 1998, the fourth hearing was held to review the outcome of additional treatment and to further resolve the question of Mooney's average weekly wage and the rate of compensation. At this hearing, almost two years after the accident, it was discovered that Mooney might have a right knee injury in addition to the left knee injury originally reported. No award was made at this hearing, but the case was "continued" until October 15, 1998 for a further exploration of the rate of compensation and Mooney's average weekly wage, in addition to a resolution of the period and extent of Mooney's disability. Mooney was required to produce clarifying medical evidence for his alleged right leg injury.

At the fifth hearing on October 15, 1998, it was determined that Mooney suffered a "12½ percent scheduled loss" of his left leg. The WCLJ then closed Mooney's case finding that compensation for 36 weeks was the proper award. Mooney did not appeal that final determination, which he would have had to have done within 30 days according to section 23 of the New York State Workers' Compensation Law.

C. Federal Jurisdiction of District Court

The District Court had jurisdiction of the original action herein pursuant to 46 U.S.C. § 688 et seq., also known as the Jones Act, general maritime law and by virtue of 28 U.S.C. §1331 and the admiralty jurisdiction of the United States pursuant to 28 U.S.C. § 1333.

D. District Court's Memorandum and Order

The City moved to dismiss Mooney's complaint for failure to state a cause of action and for summary judgment. By Memorandum and Order (one paper) dated August 2, 1999, the District Court (Kaplan, J., S.D.N.Y) granted the City's motion (A33-36).

The District Court first relied on Heagney v. Brooklyn E. Dist. Terminal, 190 F.2d 976 (2d Cir. 1951), cert. denied, 342 U.S. 920 (1952), reh'g denied, 343 U.S. 911 (1952), for the proposition that (A33-34)

> The prosecution of a claim for an acceptance of workers' compensation benefits by an employee covered by the FELA (Federal Employers' Liability Act) waived his rights to federal remedies in view of the fact that he was represented by counsel and actively pursued the compensation benefits . . .

Next, the District Court noted that Mooney applied for compensation in June 1996 and, although the City did not contest compensation, payments were eventually terminated in December 1996 after which the Board held five hearings (A35). Those hearings dealt with "the accident, the causal relation between the claimed injuries and the accident, the extent and permanency of the injury, the need for further treatment, and the rate of compensation" (A35). The Court stressed that, at all those hearings, Mooney was represented by counsel and obtained a resumption of compensation payments which ultimately totaled over $16,000 (A35). In light of these facts, the Court held that Heagney and its progeny governed this case and, as such, the Court held that Mooney waived his federal remedies (A35).

The District Court recognized that Mooney's reliance on Harney v. William M. Moore Bldg. Corp., 359 F.2d 649 (2d Cir. 1966), was misplaced, because that case concerned the mere filing of an application for Workers' Compensation benefits and the receipt of automatic, voluntary payments without the assistance of counsel (A35-36). The Court reiterated that in that circumstance, unlike Mooney's situation, there was no waiver (A36).

E. Respondent Mooney's Motion for Reconsideration and Notice of Appeal

Mooney then moved for reconsideration. By Memorandum and Order (one paper) dated August 25, 1999 (A37-41), the District Court (Kaplan, J., S.D.N.Y.) granted Mooney's request for reconsideration but upheld its earlier decision dismissing Mooney's complaint (A41).

An amended judgment was issued in the Southern District of New York on August 31, 1999 (A42-43). Mooney filed a Notice of Appeal dated September 7, 1999.

F. The First Opinion of the U.S. Court of Appeals for the Second Circuit

By opinion entered May 22, 2000, the Second Circuit vacated the amended judgment of the District Court and remanded the matter with instructions for further proceedings (A18-31).

The Second Circuit held that, under federal law, for a maritime worker to have waived his federal Jones Act remedy, he must have received a "formal award" from the Board (A25-26). Noting that no cases, including the recent case of Reyes v. Delta Dallas Alpha Corp., 199 F.3d 626 (2d Cir. 1999), relying on Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991), had defined "formal award," the Second Circuit held that a "formal award" is a written decision issued by the Board or by a WCLJ, with or without an evidentiary hearing, and filed with the office of the Chair of the Board (A26-27; 29). The Second Circuit ruled that such a "formal award" is final when the time for administrative and judicial appeal has expired or when the award has been affirmed on appeal (A27; 29). Moreover, relying on Reyes' interpretation of Gizoni, the Second Circuit held that receipt of a "formal award" will waive federal maritime claims only if the award settled all of the

claimant's claims, including his maritime claims, "in their entirety" (A24; 27-29).

The Second Circuit then held that, to determine if there was a waiver under state law, in this case the District Court, on remand, must consider whether Mooney's conduct "amounted to a waiver of his maritime claims under § 113 of the New York Workers' Compensation Law" (A30). The Second Circuit concluded that, if Mooney's conduct was an implied waiver under New York law, then the District Court was permitted to find that section 113 of the New York State Workers' Compensation Law precluded Mooney's Jones Act claim (A31).

G. The City of New York's First Petition for Rehearing and the Amended Opinion of the United States Court of Appeals for the Second Circuit

On May 25, 2000, the City filed its first petition for rehearing. The City argued that the Second Circuit's holding, that the claimant must have made a claim to the Board for maritime damages and that the Board must settle all of the claimant's claims, including his maritime claims, in their entirety, was premised on the erroneous belief that the Board was empowered to hear such substantive claims. In contrast, the City pointed out that the Board's inquiry is limited to compensation issues on a no-fault basis. On June 28, 2000, the Second Circuit denied the City's petition for rehearing in light of its amended opinion dated June 28, 2000 (A44-45).

In its amended opinion (A1-17), although the Second Circuit deleted its original language which had conferred upon the Board the power to hear substantive maritime claims, the Second Circuit continued to maintain that Gizoni, supra, 502 U.S. 81, defined a formal award as one that "settl[es the claimant's] claims in their entirety"

(A7; 9; 14). However, the Second Circuit then added that, because its decision in Reyes, supra, 199 F.3d 626, held that receipt of Workers' Compensation benefits analogous to maintenance and cure did not establish a waiver, a "formal award" of compensation will constitute a waiver of a federal Jones Act claim when the award of compensation "substantially exceed[s] interim benefits during a period of unemployment" (A9-10). The Second Circuit held that such an award would be possible if the claimant received benefits for an extended period of time beyond unemployment without indicating an intention to bring a Jones Act claim (A10). The Second Circuit explained that an award that substantially exceeds interim benefits during a period of unemployment is possible when a maritime worker receives a substantial lump sum payment pursuant to Workers' Compensation Law §15(3)(v) or receives a substantial non-schedule adjustment pursuant to Workers' Compensation Law §15(5-b) (A10-11).

The Second Circuit pointed out that, whether a waiver has occurred where a formal award directs payment that compensates substantially beyond a period of unemployment, depends on several factors, including the extent to which the payment compensates beyond the period of unemployment, the duration of the compensation payments and whether or not the claimant indicated an intention to pursue a Jones Act remedy (A15).

The remaining portion of the opinion pertaining to waiver under state law was essentially the same as in the original opinion.

H. The City of New York's Second Petition for Rehearing

On July 11, 2000, the City filed its petition for rehearing from the June 28, 2000 amended opinion. The

Second Circuit denied the petition for rehearing on September 11, 2000 (A46-47).

REASONS FOR GRANTING THE PETITION

The issue presented in this petition is vitally important to guaranteeing that long-standing precedent is upheld by ensuring that maritime workers who elect to pursue New York State Workers' Compensation benefits and who receive a "formal award" under state law are not permitted to circumvent the very state law under which they received benefits by being permitted to subsequently pursue federal tort claims against their employers.

We respectfully urge that certiorari be granted, because the Second Circuit misapprehended the power of the Board, thereby, in effect, creating an impossible test for the election of remedies for maritime personal injuries. Departing from long-standing precedent, and misinterpreting and ignoring state law, the Second Circuit created a quagmire out of what was previously simple, clearly understood rules. In the past, a seaman could freely apply for and receive no-fault Workers' Compensation benefits for maritime injuries. During the period in which his Workers' Compensation case was open, the seaman had the right to withdraw from the Workers' Compensation scheme and pursue a maritime personal injury tort action. Once such an action was commenced, the City could exercise its right of election to terminate Workers' Compensation benefits and resolve the issues of compensation in the lawsuit under general maritime law.

As such, a maritime worker's employer, such as the City here, will now be vulnerable to lawsuits where, pursuant to New York State Workers' Compensation Law § 113, it consented to provide compensation at the employee's request and, unlike in the arena of personal injury litigation, did not contest the happening of the injury,

relied on the integrity of the claimant's medical reports, did not make findings of fault and did not negotiate the amount of compensation. The Second Circuit's decision removes the incentive to the City, and other maritime employers, to accept uncontested claims for maritime injuries, if only to be faced with litigation after a formal award is issued by the Board.

Since state law may be heard in admiralty cases, the Second Circuit's holding has improperly preempted state law by rendering the waiver provision of section 113 of the New York State Workers' Compensation Law meaningless.

In its amended opinion, the Second Circuit first held that a maritime worker's receipt of a formal award will constitute a waiver only if the award "settl[ed his] claims in their entirety" (A14). For this proposition, the Second Circuit relied on its earlier interpretation in Reyes, supra, 199 F.3d 626, of this Court's holding in Gizoni, supra, 502 U.S. 81 (A7; 9; 14). However, the Second Circuit misquoted this Court in Gizoni by adding the qualifying language "settl[ed his] claims in their entirety" to the "universally accepted" law that a formal award will bar a subsequent Jones Act claim. Gizoni, supra, 502 U.S. at 91 ("It is by now 'universally accepted' that an employee who receives voluntary payments under the [Longshore and Harbor Workers' Compensation Act] without a formal award is not barred from subsequently seeking relief under the Jones Act"). As such, the Second Circuit's holding conflicts with this Court's ruling in Gizoni.

By grafting this new standard onto the formal award test, the Second Circuit has begged the question as to which "claims" the Second Circuit is now requiring the Board to have settled "in their entirety" so as to constitute a waiver. In determining whether to award compensation, the Board is only empowered to hear compensation issues, such as whether the accident arose out of and in the course of the

claimant's employment, whether the injury is compensable as an accidental injury or as an occupational disease and the extent of injury. The Board's power is limited to determining compensation on a no-fault basis. The Board may not, as it does not have the power to, determine the merits of tort actions such as maritime claims.

Nonetheless, it appears that the Second Circuit intended that the Board settle not just the maritime worker's compensation claims, but, rather, his substantive maritime claims, because it then held that, unless the claimant received an award of compensation "substantially exceeding interim benefits during a period of unemployment," the acceptance of Workers' Compensation benefits will not waive a federal Jones Act remedy, even if such benefits were incorporated in a formal award (A9-10). However, the Board cannot award more money than that which it is statutorily authorized. The Second Circuit would find that a waiver exists only where the Board exceeds its authority, ultra vires. As such, if the Second Circuit is suggesting that the Board may evaluate the merits of a claimant's potential maritime claims, and then issue an award that substantially exceeds the period he was out of work, the Court is suggesting an impossible task.

The Second Circuit relied on section 15(3)(v) and section 15(5-b) of the New York State Workers' Compensation Law as examples of instances in which a claimant may purportedly receive compensation exceeding interim benefits during a period of unemployment (A10-11). We respectfully submit that the Second Circuit misconstrued the purpose of these sections and the power of the Board. Both sections address the long-term disability status of employees who, due to the nature of their "scheduled loss," are entitled to receive additional compensation for "wage impairment" beyond the date of

their termination of employment. These sections do not pertain to situations in which the claimant returns to work.

By relying on these sections of the Workers' Compensation Law, the Second Circuit has made the erroneous assumption that the Board issues, or has the power to issue, additional money to a claimant who returns to work after a workplace injury. This is not so. Rather, Workers' Compensation provides a claimant with benefits which compensate for his or her wage loss, either actual wage loss (time out of work) or presumed wage loss (also known as a scheduled loss which is not dependent on the actual time missed from work). In contrast, only a plenary action under the Jones Act could additionally award a maritime worker money for pain and suffering.

Here, Mooney sustained a scheduled loss. The Board only had the power to award benefits which were statutorily authorized based on his average weekly wage. The Board, which is a separate governmental entity apart from the employer, was not empowered to grant any increase or decrease in the amount to which Mooney was statutorily entitled. As is usually the case, Mooney received a scheduled loss that approximated the amount of time he lost from work.

Mooney received all that he was entitled to receive based on the medical evidence presented at the hearings. The Board awarded a scheduled loss, and Mooney did not appeal the final determination of the Board. However, the Second Circuit would, nonetheless, find that he, and other injured maritime workers in the same situation, could still pursue a Jones Act claim, because "substantial" compensation benefits in excess of what the Board was empowered to award were not received. The Second Circuit's amended ruling and its misplaced reliance on sections 15(3)(v) and 15(5-b) of the Workers' Compensation Law suggest that the Board could have

given Mooney more money. This is not possible where, as here, Mooney returned to work and sustained a specific scheduled loss of use. Indeed, it is not even theoretically possible for the Board to award "compensation substantially exceeding interim benefits during a period of unemployment" nor would the Board have any reason to award a maritime worker greater benefits than it would provide to any other type of claimant.

The Second Circuit's amended ruling has created a new standard which, by focusing not just on the finality of the compensation award, but, rather, on the sufficiency of the award, is overturning years of precedent. As was discussed above, this adds uncertainty for an employer, such as the City here, who consents, pursuant to section 113 of the New York State Workers' Compensation Law, to pay compensation to a maritime worker, only to find that the employee's request for compensation and the employer's consent to provide such benefits are insufficient to prevent a personal injury lawsuit after a formal award is issued by the Board.

The Second Circuit's amended ruling has set an unworkable standard, because the Board cannot achieve what the Court has proposed. The Second Circuit's holding in effect overrules established precedent that a formal award of compensation bars a maritime personal injury claim. See Gizoni, supra, 502 U.S. at 91. With all due respect, the Second Circuit has improperly grafted a "substantiality" requirement onto Gizoni's well-settled formal award test, an unattainable standard.

CONCLUSION

For the reasons set forth, petitioner, the City of New York, respectfully asks this Court to grant its petition for a writ of certiorari.

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November 27, 2000

APPENDIX

[AMENDED OPINION]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: April 11, 2000 Decided: May 22, 2000
As Amended: June 28, 2000)

Docket No. 99-9062

GEORGE MOONEY,

Plaintiff-Appellant,

-v.-

THE CITY OF NEW YORK

Defendant-Appellee.

Before:

NEWMAN, KEARSE, and KATZMANN,

Circuit Judges.

Appellant appealed from an amended judgment of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) granting appellee's motion for summary judgment.

Vacated and remanded.

EDWARD M. KATZ, Cappiello, Hofmann & Katz, New York, NY, *for Appellant.*

JULIE STEINER, Assistant Corporation Counsel (Michael D. Hess, Corporation Counsel of the City of New York; Steven Levi, Elizabeth S. Natrella, Ralph Foertsch, *of counsel*), *for Appellee.*

KATZMANN, *Circuit Judge*:

George Mooney, plaintiff-appellant, appeals from the amended judgment of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*), granting summary judgment in favor of the City of New York (the "City"), defendant-appellee. The district court held that an award of workers' compensation benefits constituted a waiver of a Jones Act claim. For the reasons that follow, we vacate the amended judgment of the district court and remand with instructions for further proceedings.

I. BACKGROUND

The essential facts are not in dispute except where noted. George Mooney was an employee of the Department of Transportation of the City of New York (the "City") at all times relevant to this action. The City is a self-insured employer. In May 1996, while assigned to work aboard a Staten Island ferry, Mooney slipped and fell on a set of stairs in the engine room. In June 1996, with the assistance of counsel, Mooney filed a claim under the New York State Workers' Compensation Law for alleged injuries to his right leg and back. On June 27, 1996, the City advised the New York State Workmen's Compensation Board (the "Board"), which is established under N.Y. Work. Comp. Law § 142(1) "to hear and determine all claims for compensation or benefits" under that law, that the City would not contest Mooney's right to compensation, provided Mooney submitted prima facie medical evidence and a medical consultant's report. Mooney did so.

Mooney began receiving compensation benefits in November 1996 pending a hearing before the Board, but payments were suspended in December 1996 due to a lack of updated medical evidence. In January 1997, the first hearing involving Mooney's workers' compensation claim was held before a workers' compensation law judge. The judge received evidence regarding Mooney's accident, notice to his employer, his injuries for the period from the accident until January 1997, and the causal connection between the accident and the injuries. The judge determined that Mooney was entitled to workers' compensation benefits from May 17, 1996 to January 15, 1997, less two days he worked, at the rate of $400 per week. He also directed the City to continue payments beyond January 15, 1997 pending further determination, and the City complied.

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unseaworthiness under general maritime law, as well as for a seaman's traditional remedies of maintenance and cure.[1] After discovery, the City moved for summary judgment on the ground that Mooney's acceptance of workers' compensation over a nine-month period, while represented by counsel, together with his failure to appeal timely the closure of his case, constituted an implied waiver of his federal maritime rights.[2]

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[1] Maintenance includes sustenance and a berth while aboard ship and payment for the cost of board and lodging while ashore. Cure refers to proper care of the injured seaman. *See* Martin J. Norris, *The Law of Maritime Personal Injuries* 29-30 (4th ed. 1990). Mooney does not appeal the dismissal of his claim for maintenance and cure.

[2] The City did not plead waiver as an affirmative defense in its Answer to the Complaint. Ordinarily, "a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." Charles A. Wright & Arthur R. Miller, 5 *Federal Practice & Procedure* § 1278, at 477 (1990); *see United States v. Continental Illinois Nat'l Bank & Trust Co. of Chicago*, 889 F.2d 1248, 1253 (2d Cir. 1989). A defendant may move to amend its pleading "to assert an omitted affirmative defense on the written consent of the adverse party or by leave of court, which 'shall be freely given when justice so requires.'" Wright & Miller, *supra*, at 495 (quoting Fed. R. Civ. P. 15(a)). In this case, Mooney responded on the merits of the City's waiver defense without objecting to the assertion of the defense by motion rather than by responsive pleading. Thus, we may interpret Mooney's conduct as an implied consent to file an amended Answer. Alternatively, we may construe the district court's ruling on the merits of the waiver defense as an implied grant of leave to amend the Answer, since Mooney has not alleged any prejudice. In either case, we conclude that the waiver defense has not been waived.

A. *The district court's decision*

By Order dated August 2, 1999, the district court granted the City's motion. On Mooney's motion for reconsideration, the court again held in favor of the City and entered judgment accordingly. The district court relied primarily on *Heagney v. Brooklyn Eastern Dist. Terminal,* 190 F.2d 976 (2d Cir. 1951), which dealt with the analogous question of whether acceptance of workers' compensation benefits constituted a waiver of remedies otherwise available under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. ("FELA"). The court:

> underst[ood] *Heagney* as adopting the view, essentially policy-based, that the active pursuit of a worker's compensation claim in which the claimant is represented by counsel waives any maritime tort claim without regard to the subjective understanding and intention of the plaintiff.

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The court found the facts in the present case to be "at least as strong for the defendant as those in *Heagney*." *Id.* at 2. In particular, the district court found that:

> [w]hile the City did not controvert compensation, payments, after initially commencing were terminated in December 1996. The Workers' Compensation Board subsequently held five hearings . . . on issues including the accident, the causal relation between the claimed injuries and the accident, the extent and permanency of the injury, the need for further treatment, and the rate of compensation. Plaintiff was represented throughout by counsel. He obtained resumption of

> compensation payments after the initial termination and a further series of awards. He did not institute this action until approximately 26 months after first receiving compensation payments, which ultimately totaled over $16,000.

Id. Based on these facts, the district court granted summary judgment for the City.

B. *Reyes v. Delta Dallas Alpha Corporation*

In December 1999, after the district court's ruling, this Court decided *Reyes v. Delta Dallas Alpha Corp.*, 199 F.3d 626 (2d Cir. 1999). The plaintiff in that case, while receiving ongoing voluntary workers' compensation from his employer, notified his employer that he had asserted a claim, presumably with the Board, under federal maritime law and intended to treat the compensation payments as a "set-off." *See id.* at 628. The record did not indicate that either the employer or the Board acted on this claim before the employee filed a subsequent Jones Act suit in federal court. *See id.* On motion by the employer, the district court granted summary judgment dismissing the complaint on the ground that the plaintiff's prosecution of a claim for state workers' compensation benefits amounted to a waiver of his Jones Act rights. *See id.*

On appeal, this Court vacated the district court's judgment, noting that:

> In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 91 (1991), the Supreme Court held that the receipt of voluntary worker's compensation payments under a federal worker's compensation statute does not bar a subsequent action under the Jones Act, *unless the claimant received a formal award from the compensation board settling his claims in their entirety.*

Id. (emphasis added). Therefore, the Court held that "federal law does not treat Reyes's mere receipt of interim compensation payments as a waiver of his Jones Act claim." *Id.* at 629.

Furthermore, the Court held that § 113 of the New York Workers' Compensation Law did not bar the maritime action. Section 113 provides, in relevant part, that:

> awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty . . . rights and remedies . . . .

N.Y. Work. Comp. Law § 113 (McKinney 2000). The Court concluded that Reyes's conduct would not be considered as a waiver under New York law because he "never 'evince[d] an intention to waive redress under the Jones Act.'" *Reyes*, 199 F.3d at 629 (alteration in original) (quoting *Dacus v. Spin-Nes Realty & Constr.* Co., 22 N.Y.2d 427, 430, 293 N.Y.S.2d 83, 239 N.E.2d 718 (1968)).

The Court expressly rejected the employer's reliance on *Heagney*, stating that it was "superseded authority" insofar as it predated *Gizoni* and the New York Court of Appeals' interpretation of § 113. *Reyes*, 199 F.3d at 629. Because the district court's decision in the present case rested heavily on *Heagney*, we vacate and remand for the court to reconsider the City's summary judgment motion in light of *Reyes* and this opinion.

II. DISCUSSION

A. *Waiver under federal law*

Our first task is to consider carefully the applicable standard for waiver of maritime claims as a result of an adjudication by a state compensation board. Our starting point is this Court's recent decision in *Reyes*. Initially, we note that the holding of *Reyes* is that the circumstances shown by the record in that case did not establish waiver as a matter of law. *Reyes* is thus a more reliable guide for determining when waiver has not occurred than for determining when waiver might occur. We then notice that a key point supporting the *Reyes* holding that waiver had not been established as a matter of law concerned the nature of the benefits that the claimant received. *Reyes* noted, following *Gizoni*, 502 U.S. at 91, and the authorities on which *Gizoni* relied, that the interim benefits Reyes had received "are best analogized to the traditional maritime remedy of 'maintenance and cure,'" receipt of which "has not historically barred subsequent tort actions by injured seamen." *Reyes*, 199 F.3d at 629. It was in the context of noting compensation benefits that did not establish waiver that *Reyes* then suggested that waiver might exist if "the claimant received a formal award settling his claims in their entirety." *Id.* at 628. This last suggestion could easily be given an unwarranted and overly broad interpretation if it were read to mean that a formal award of compensation benefits, settling the entirety of a compensation claim, will always waive a Jones Act claim. We do not think that the Court in *Reyes*, having ruled that receipt of compensation payments analogous to maintenance and cure do not establish a waiver, could have meant that such payments constitute a waiver simply

because they are comprehended in a "formal award."[3] The phrase "formal award" in *Reyes* cannot be divorced from the more significant phrase to which it is attached, "settling his claims in their entirety."

Thus, we understand *Reyes* to mean that when the circumstances make it clear that a claimant has elected to receive compensation benefits in lieu of all of the claims he could pursue (including a Jones Act claim), a "formal award" and acceptance of such compensation benefits can evidence a waiver of a Jones Act claim. An award of compensation substantially exceeding interim benefits during a period of unemployment might indicate a waiver, especially if the claimant received such benefits for an extended period of time beyond unemployment without indicating an intention to bring a Jones Act claim. For example, a claimant who received one or more substantial lump sum awards pursuant to § 15(3)(v)[4] of the Workers'

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[3] We note that the "formal award" language in *Gizoni* was used to focus on an issue different from the issue of whether the amount, duration, and purpose of payments received from a compensation board waived a Jones Act claim. The issue in *Gizoni* concerned the status of the claimant. The Supreme Court, considering whether a favorable adjudication of a claim under the federal Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq., barred a Jones Act claim, ruled that the Jones Act claim was barred because LHWCA benefits could be awarded only after a determination that the claimant was not a seaman. *See Gizoni*, 502 U.S. at 91. No comparable determination of status is made by a state compensation board.

[4] N.Y. Work. Comp. Law § 15(3)(v) provides, in relevant part, for additional compensation for lost wages in certain permanent disabilities:

Notwithstanding any other provision of this subdivision, additional compensation shall be payable for impairment of wage earning capacity for any period after the termination of an award under paragraphs a, b,

Compensation Law or a substantial non-schedule adjustment pursuant to § 15(5-b)[5] may have waived his federal remedies. However, an interim award of compensation benefits that are analogous to maintenance and cure does not establish waiver, even if incorporated in a formal award.

The parties in this case dispute whether Mooney had received a formal award from the Board that bars the present action. The City seeks merely to equate a formal award with a final decision of the Board. It points out that Mooney received notice that his case had been closed, that the $16,400 awarded to him represented payment in full for his disability, and that the decision became final and conclusive when Mooney failed to file a timely appeal.

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c, or d, of this subdivision for the loss or loss of use of fifty per centum or more of a member, provided such impairment of earning capacity shall be due solely thereto.

[5] N.Y. Work. Comp. Law § 15(5-b) provides, in relevant part:

Non-schedule adjustments. Notwithstanding any other provision of this chapter, in any case coming within the provisions of subdivisions three or five of this section, in which the right to compensation has been established and compensation has been paid for not less than three months, in which the continuance of disability and of future earning capacity cannot be ascertained with reasonable certainty, the board may, in the interest of justice, approve a non-schedule adjustment agreed to between the claimant and the employer or his insurance carrier. . . . The board may, in such case, order all future compensation to be paid in one or more lump sums or periodically, and any such adjustment shall be regarded as a closing of the claim unless the board find [sic] upon proof that there has been a change in condition or in the degree of disability of claimant not found in the medical evidence and, therefore, not contemplated at the time of the adjustment.

Mooney, on the other hand, contends that only the receipt of a lump sum award above and beyond his workers' compensation entitlement should count as a waiver of his federal claims.

We address in this opinion the meaning of "formal award," referred to in *Reyes*, and the circumstances under which the receipt of a formal award constitutes an implied waiver of a Jones Act or general maritime law claim as a matter of federal law. We reject Mooney's definition of formal award and conclude that the City's definition is insufficient.

None of the authorities cited by the *Reyes* court or by the Supreme Court in *Gizoni* defined a formal award. Nor does this term appear anywhere in the New York Workers' Compensation Law. However, the statute provides other guidance. Under the statute, with limited exceptions not applicable here,[6] only the Board is authorized to make compensation awards:

> The board shall have full power and authority to determine all questions in relation to the payment of claims . . . and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted . . . , or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the chair.

N.Y. Work. Comp. Law § 20(1). Section 142, entitled "General powers and duties of the workmen's compensation board," provides that the Board is empowered, among other things, to hear and determine all claims for compensation or benefits and to modify or

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[6] *See* N.Y. Work. Comp. Law § 20(2).

rescind awards. *See id.* § 142(1). The statute also uses the term "award" interchangeably with the term "decision". *See id.* § 23 ("An award or decision of the board shall be final and conclusive upon all questions within its jurisdiction . . . ."). An award by the Board is contrasted with situations where the employer or insurer pays compensation to the claimant directly, "without waiting for an award by the board," because no controversy exists between them. *Id.* § 25(1); *see also* 9 Arthur Larson and Lex K. Larson, *Workers' Compensation Law* § 90.51(a)-(c) (1999) (noting that compensation may be given without the employee ever having filed a claim, upon the filing of a claim but without a Board award, or pursuant to an award); Grant Gilmore and Charles L. Black, Jr., *Law of Admiralty* 435 (2d ed. 1975) (same).

We therefore believe that a "formal award" is a written decision issued by the Board and filed with the office of the Chair of the Board. A decision or award is issued by the Board when it is made by "a member or panel of the board or by a Workers' Compensation Law Judge." N.Y. Work. Comp. Law App. § 300.1(a)(1). Moreover, an award may be formal even if it was made without the benefit of an evidentiary hearing because the Workers' Compensation Law does not mandate a hearing before the Board issues an award. In addition, the award must become final and conclusive, and not subject to further modification, either because the time for administrative and judicial appeals has expired, or because the award has been affirmed on appeal. *See id.* § 23. A commonsense application of this definition is that a formal award may provide for a lump sum payment or a series of payments. We reject Mooney's argument, based on his misplaced reliance on a footnote in *Reyes*, that only a lump sum payment may be deemed a formal award precluding the Jones Act suit. *See Reyes*, 199 F.3d at 629 n.1. That decision merely explained that a petition to the Board for a

lump sum payment was insufficient to trigger a waiver because, under *Gizoni*, only the receipt of payments constitutes a waiver. *See id. Reyes* did not suggest, much less hold, that only a lump sum payment could be deemed a waiver.

We emphasize that a complainant's receipt of a formal award constitutes a waiver of his or her federal maritime claims only if the formal award "settl[ed the complainant's] claims in their entirety." *Id.* at 628. This requirement is simply an application of the well-established principles of waiver, which we do not interpret *Reyes* to have altered. We have held, in other situations, that a waiver need not be express, but may be inferred from the conduct of the parties. *See Tray-Wrap, Inc. v. Six L's Packing Co.*, 984 F.2d 65, 68 (2d Cir. 1993); *NLRB v. New York Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991). "[T]he conduct said to constitute a waiver must be clear and unequivocal, as waivers are never to be lightly inferred." *Tray-Wrap*, 984 F.2d at 68; *see Banff, Ltd. v. Colberts, Inc.*, 996 F.2d 33, 36 (2d Cir. 1993). We will infer a waiver only where "the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them." *New York Tel.*, 930 F.2d at 1011. Moreover, the party asserting an implied waiver as a matter of law carries the burden of proving that these requirements have been met. *See id.* (Party asserting waiver "bears the weighty burden of establishing that a 'clear and unmistakable' waiver has occurred." (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983))); *cf. United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997) (party asserting the affirmative defense of estoppel has burden of proof).

These fundamental principles are equally applicable to the workers' compensation context. Thus, a formal award that gives the claimant no more than payments that are analogous to maintenance and cure will not be deemed

to settle all of the seaman's claims and will not bar a Jones Act suit. Whether waiver occurs where a formal award directs payment that includes money not analogous to maintenance and cure, *i.e.*, that compensates substantially beyond a period of unemployment, might well depend on a variety of factors, such as the extent to which the payment compensates beyond the period of unemployment, the duration of the compensation payments, and whether or not the claimant indicated an intention to pursue a Jones Act remedy. Waiver will not be inferred unless the circumstances make it clear that the claimant elected to pursue a compensation remedy in lieu of a Jones Act remedy.

In the pending case, it appears that the Board awarded compensation of $16,400 at a rate of $400 a week. This award for 41 weeks appears to cover the period of Mooney's unemployment (although it might have exceeded that period by a *de minimis* amount of two days). When the Board determined the extent of Mooney's disability, it concluded that he had suffered a 12 1/2 percent loss of use of his right leg. Loss of a leg entitles a claimant to compensation for 288 weeks. *See* N.Y. Work. Comp. Law § 15(3)(b) (1993). Thus, the Board determined that Mooney's partial disability entitled him to 36 weeks of compensation (12 1/2 % x 288). Since he had already been paid for 41 weeks, the Board awarded no further compensation. If, on remand, the District Court determines that, as now appears, the only compensation awarded covered the period of Mooney's unemployment and was therefore analogous to maintenance and cure, then the Board's award, even if formal, did not settle all of his claims and does not bar a Jones Act remedy.

B. *Waiver under state law*

What the parties have referred to as a waiver under state law does not differ, in practical effect, from waiver under federal law. Indeed, if state law were to create a standard for waiver of a federal claim more easily met than the federal standard, then, as *Reyes* noted, "we would be required to consider whether the state statute as applied conflicts with important federal regulatory interests." *Reyes*, 199 F.3d at 629. But New York does not use a more lenient standard. As *Reyes* noted, the New York Court of Appeals has construed section 113 strictly, ruling that a waiver will not be found unless it is "express," *Pedersen v. Manitowoc Co.*, 25 N.Y.2d 412, 417, 306 N.Y.S.2d 903, 907 (1969), or at least "unequivocal," *Dacus v. Spin-Nes Realty & Constr. Co.*, 22 N.Y.2d 427, 431, 293 N.Y.S.2d 83, 87 (1968).

We believe that *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367 (1953), provides guidance in resolving the waiver question. Ahern, an interstate railroad employee, was injured on the job and was awarded weekly compensation by the Board. *See id.* at 368. He later died of his injuries. *See id.* at 369. At a subsequent hearing to determine a final disability award, the railroad for the first time argued that the Board lacked jurisdiction over the workers' compensation claim because the deceased was covered under FELA, which allegedly deprived the Board of jurisdiction. *See id.* The Board rejected the argument and the New York Court of Appeals affirmed, invoking § 113 and holding that Ahern had waived his FELA rights by accepting workers' compensation. *See id.*

On appeal to the United States Supreme Court, the railroad argued that the state high court's interpretation of § 113 "unconstitutionally authorize[d] the Workmen's Compensation Board to invade a field foreclosed by

governing federal legislation." *Id.* at 370-71. The Supreme Court disagreed, finding that the New York Court of Appeals successfully avoided a federal-state collision by interpreting § 113 as "a mere legislative authorization, *permitting* the Board to effectuate private agreements for compromising a federal controversy by resort to an impartial local umpire -- that is all that section 113 of the Workmen's Compensation Law purports to accomplish. The difference between coercion and permission is decisive." *Id.* at 372 (emphasis in original) (internal quotation marks and footnote omitted). If, as a permissive legislative device, § 113 would validly preclude an FELA action, we see no principled reason why it may not also bar a Jones Act or general maritime law claim. Therefore, if, on remand, the district court finds that Mooney's conduct would be an unequivocal waiver under New York law, then the court may conclude that § 113 precludes the present action. We stress, however, that we express no opinion on the merits of the City's waiver defense.

CONCLUSION

For the reasons explained above, we vacate the amended judgment of the district court and remand for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: April 11, 2000 Decided: May 22, 2000)

Docket No. 99-9062

GEORGE MOONEY,

Plaintiff-Appellant,

-v.-

THE CITY OF NEW YORK

Defendant-Appellee.

Before:

NEWMAN, KEARSE, and KATZMANN,

Circuit Judges.

Appellant appealed from an amended judgment of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) granting appellee's motion for summary judgment.

Vacated and remanded.

EDWARD M. KATZ, Cappiello, Hofmann & Katz, New York, NY, *for Appellant.*

JULIE STEINER, Assistant Corporation Counsel (Michael D. Hess, Corporation Counsel of the City of New York; Steven Levi, Elizabeth S. Natrella, Ralph Foertsch, *of counsel*), *for Appellee.*

KATZMANN, *Circuit Judge*:

George Mooney, plaintiff-appellant, appeals from the amended judgment of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*), granting summary judgment in favor of the City of New York, defendant-appellee. The district court held that an award of workers' compensation benefits constituted a waiver of a Jones Act claim. For the reasons that follow, we vacate the amended judgment of the district court and remand with instructions for further proceedings.

I. BACKGROUND

The essential facts are not in dispute except where noted. George Mooney was an employee of the Department of Transportation of the City of New York (the "City") at all times relevant to this action. The City is a self-insured employer. In May 1996, while assigned to work aboard a Staten Island ferry, Mooney slipped and fell on a set of stairs in the engine room. In June 1996, with the assistance of counsel, Mooney filed a claim under the New York State Workers' Compensation Law for alleged injuries to his right leg and back. On June 27, 1996, the City advised the New York State Workmen's Compensation Board (the "Board"), which is established

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[2] The City did not plead waiver as an affirmative defense in its Answer to the Complaint. Ordinarily, "a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." CHARLES A. WRIGHT & ARTHUR R. MILLER, 5 FEDERAL PRACTICE & PROCEDURES § 1278, at 477 (1990); *see United States v. Continental Illinois Nat'l Bank & Trust Co. of Chicago*, 889 F.2d 1248, 1253 (2d Cir. 1989). A defendant may move to amend its pleading "to assert an omitted affirmative defense on the written consent of the adverse party or by leave of court, which 'shall be freely given when justice so requires.'" WRIGHT & MILLER, *supra*, at 495 (quoting Fed. R. Civ. P. 15(a)). In this case, Mooney responded on the merits of the City's waiver defense without objecting to the assertion of the defense by motion rather than by responsive pleading. Thus, we may interpret Mooney's conduct as an implied consent to file an amended Answer. Alternatively, we may construe the district court's ruling on the merits of the waiver defense as an implied grant of leave to amend the Answer, since Mooney has not alleged any prejudice. In either case, we conclude that the waiver defense has not been waived.

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Id. Based on these facts, the district court granted summary judgment for the City.

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in federal court. *See id.* On motion by the employer, the district court granted summary judgment dismissing the complaint on the ground that the plaintiff's prosecution of a claim for state workers' compensation benefits amounted to a waiver of his Jones Act rights. *See id.*

On appeal, this Court vacated the district court's judgment, noting that:

> In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 91 (1991), the Supreme Court held that the receipt of voluntary worker's compensation payments under a federal worker's compensation statute does not bar a subsequent action under the Jones Act, *unless the claimant received a formal award from the compensation board settling his claims in their entirety.*

Id. (emphasis added). Therefore, the Court held that "federal law does not treat Reyes's mere receipt of interim compensation payments as a waiver of his Jones Act claim." *Id.* at 629.

Furthermore, the Court held that § 113 of the New York Workers' Compensation Law did not bar the maritime action. Section 113 provides, in relevant part, that:

> awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty . . . rights and remedies . . . .

N.Y. Work. Comp. Law § 113 (McKinney 2000). The Court concluded that Reyes's conduct would not be considered as a waiver under New York law because he "never 'evince[d] an intention to waive redress under the Jones Act.'" *Reyes*, 199 F.3d at 629 (alteration in original)

(quoting *Dacus v. Spin-Nes Realty & Constr. Co.*, 22 N.Y.2d 427, 430 (1968)).

The Court expressly rejected the employer's reliance on *Heagney*, stating that it was "superseded authority" insofar as it predated *Gizoni* and the New York Court of Appeals' interpretation of § 113. *Reyes*, 199 F.3d at 629. Because the district court's decision in the present case rested heavily on *Heagney*, we vacate and remand for the court to reconsider the City's summary judgment motion in light of *Reyes* and this opinion.

II. DISCUSSION

The parties in this case dispute whether Mooney had received a formal award from the Board that bars the present action. The City seeks merely to equate a formal award with a final decision of the Board. It points out that Mooney received notice that his case had been closed, that the $16,400 awarded to him represented payment in full for his disability, and that the decision became final and conclusive when Mooney failed to file a timely appeal. Mooney, on the other hand, contends that only the receipt of a lump sum award above and beyond his workers' compensation entitlement should count as a waiver of his federal claims.

We address in this opinion the meaning of "formal award," referred to in *Reyes*, and the circumstances under which the receipt of a formal award constitutes an implied waiver of a Jones Act or general maritime law claim as a matter of federal law. We reject Mooney's definition of formal award and conclude that the City's definition is insufficient.

A. *Waiver under federal law*

None of the authorities cited by the *Reyes* court or by the Supreme Court in *Gizoni* defined a formal award. Nor does this term appear anywhere in the New York Workers' Compensation Law. However, the statute provides other guidance. Under the statute, with limited exceptions not applicable here,[3] only the Board is authorized to make compensation awards:

> The board shall have full power and authority to determine all questions in relation to the payment of claims . . . and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted . . . , or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the chair.

N.Y. Work. Comp. Law § 20(1). Section 142, entitled "General powers and duties of the workmen's compensation board," provides that the Board is empowered, among other things, to hear and determine all claims for compensation or benefits and to modify or rescind awards. *See id.* § 142(1). The statute also uses the term "award" interchangeably with the term "decision". *See id.* § 23 ("An award or decision of the board shall be final and conclusive upon all questions within its jurisdiction . . . ."). An award by the Board is contrasted with situations where the employer or insurer pays compensation to the claimant directly, "without waiting for an award by the board," because no controversy exists between them. *Id.* § 25(1); *see also* 9 ARTHUR LARSON AND LEX K. LARSON, WORKERS' COMPENSATION LAW § 90.51(a)-(c) (1999) (noting that compensation may

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[3] *See* N.Y. Work. Comp. Law § 20(2).

be given without the employee ever having filed a claim, upon the filing of a claim but without a Board award, or pursuant to an award); GRANT GILMORE AND CHARLES L. BLACK, JR., LAW OF ADMIRALTY 435 (2d ed. 1975) (same).

We therefore believe that a "formal award" is a written decision issued by the Board and filed with the office of the Chair of the Board. A decision or award is issued by the Board when it is made by "a member or panel of the board or by a Workers' Compensation Law Judge." N.Y. Work. Comp. Law App. § 300.1(a)(1). An award may be formal even if it was made without the benefit of an evidentiary hearing because the Workers' Compensation Law does not mandate a hearing before the Board issues an award. In addition, the award must become final and conclusive, and not be subject to further modification, either because the time for administrative and judicial appeals has expired, or because the award has been affirmed on appeal. *See id.* § 23. A commonsense application of this definition is that a formal award may provide for a lump sum payment or a series of payments. We reject Mooney's argument, based on his misplaced reliance on a footnote in *Reyes*, that only a lump sum payment exceeding his workers' compensation entitlement may be deemed a formal award precluding the Jones Act suit. *See Reyes*, 199 F.3d at 629 n.1. That decision merely explained that a petition to the Board for a lump sum payment was insufficient to trigger a waiver because, under *Gizoni*, only the receipt of payments constitutes a waiver. *See id. Reyes* did not suggest, much less hold, that only a lump sum payment may be deemed a waiver.

We emphasize that a complainant's receipt of a formal award constitutes a waiver of his or her federal maritime claims only if the formal award "settl[ed the complainant's] claims in their entirety." *Id.* at 628. This

requirement is simply an application of the well-established principles of waiver, which we do not interpret *Reyes* to have altered. We have held, in other situations, that a waiver need not be express, but may be inferred from the conduct of the parties. *See Tray-Wrap, Inc. v. Six L's Packing Co.*, 984 F.2d 65, 68 (2d Cir. 1993); *NLRB v. New York Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991). "[T]he conduct said to constitute a waiver must be clear and unequivocal, as waivers are never to be lightly inferred." *Tray-Wrap*, 984 F.2d at 68; *see Banff, Ltd. v. Colberts, Inc.*, 996 F.2d 33, 36 (2d Cir. 1993). We will infer a waiver only where "the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them." *New York Tel.*, 930 F.2d at 1011. Moreover, the party asserting an implied waiver as a matter of law carries the burden of proving that these requirements have been met. *See id.* (Party asserting waiver "bears the weighty burden of establishing that a 'clear and unmistakable' waiver has occurred." (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983))); *cf. United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997) (party asserting the affirmative defense of estoppel has burden of proof).

These fundamental principles are equally applicable to the workers' compensation context. Thus, where the employer (or insurer) establishes that the complainant has made a claim to the Board for maritime damages, the Board has issued a formal award purporting to settle all of the complainant's claims, and the complainant has failed to appeal, the dual requirements of knowledge and subjective intent are satisfied. In these circumstances, the claimant's receipt of a formal award amounts to a waiver of his or her maritime remedies as a matter of federal law.

On the other hand, a formal award, even though final, would not bar a federal maritime action if it does not resolve all of the claims that the injured party presented to

the Board, since such an award would not settle the injured party's claims in their entirety. Acceptance of a formal award also would not waive a federal maritime action commenced before the award became final, since in that case the complainant has indicated an intent to seek redress in a different forum before the award became final. Furthermore, a formal award cannot be said to extinguish a claim that was never presented to the Board and for which the statute of limitations has not yet expired.

To summarize, a formal award is a written decision issued with or without an evidentiary hearing, by a member or panel of the Board or by a workers' compensation law judge, and filed with the office of the Chair of the Board. Acceptance of a formal award constitutes an implied waiver of a complainant's maritime claims as a matter of federal law where those claims were presented to and resolved by the Board, and the Board's award became final and conclusive pursuant to § 23 of the New York Workers' Compensation Law before a maritime action is filed. On remand, therefore, the district court should consider: (1) whether Mooney had filed a claim with the Board for maritime damages in addition to workers' compensation; (2) whether the Board had issued a formal award settling all of Mooney's claims that were pending prior to the commencement of this case;[4] and (3) whether the formal award, if issued, became final and conclusive on the parties before Mooney commenced the present action. The district court is free, of course, to develop additional facts.

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[4] The latest Board Notice of Decision in the record, dated December 11, 1997, indicates that "Case is continued." Although the parties agree that the Board closed the case after the October 1998 hearing, the only document in the record indicating that Mooney's claim had been closed is an untitled document on the Law Department's letterhead, dated October 15, 1998. A notice from the City does not constitute a formal award of the Board.

B. *Waiver under state law*

The district court should also consider, on remand, whether Mooney's conduct amounted to a waiver of his maritime claims under § 113 of the New York Workers' Compensation Law. This is a fact-specific inquiry which the district court should conduct and resolve in the first instance. To assist that inquiry, we offer one point of clarification.

In *Reyes*, this Court noted preliminarily that if the actions of the employee in that case were deemed a waiver under New York law, "we would be required to consider whether the state statute as applied conflicts with important federal regulatory interests." *Reyes*, 199 F.3d at 629. We believe that *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367 (1953), provides guidance in resolving this question. Ahern, an interstate railroad employee, was injured on the job and was awarded weekly compensation by the Board. *See id.* at 368. He later died of his injuries. *See id.* at 369. At a subsequent hearing to determine a final disability award, the railroad for the first time argued that the Board lacked jurisdiction over the workers' compensation claim because the deceased was covered under FELA, which allegedly deprived the Board of jurisdiction. *See id.* The Board rejected the argument and the New York Court of Appeals affirmed, invoking § 113 and holding that Ahern had waived his FELA rights by accepting workers' compensation. *See id.*

On appeal to the United States Supreme Court, the railroad argued that the state high court's interpretation of § 113 "unconstitutionally authorize[d] the Workmen's Compensation Board to invade a field foreclosed by governing federal legislation." *Id.* at 370-71. The Supreme Court disagreed, finding that the New York Court of Appeals successfully avoided a federal-state collision by interpreting § 113 as "a mere legislative authorization,

permitting the Board to effectuate private agreements for compromising a federal controversy by resort to an impartial local umpire--that is all that section 113 of the Workmen's Compensation Law purports to accomplish. The difference between coercion and permission is decisive." *Id.* at 372 (emphasis in original) (internal quotation marks and footnote omitted). If, as a permissive legislative device, § 113 would validly preclude an FELA action, we see no principled reason why it may not also bar a Jones Act or general maritime law claim. Therefore, if, on remand, the district court finds that Mooney's conduct would be an implied waiver under New York law, then the court may conclude that § 113 precludes the present action. We stress, however, that we express no opinion on the merits of the City's waiver defense.

CONCLUSION

For the reason explained above, we vacate the amended judgment of the district court and remand for further proceedings consistent with this opinion.

GEORGE MOONEY, Plaintiff-Appellant, v. THE CITY OF NEW YORK, Defendant-Appellee,

Docket No 99-9062

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

213 F.3d 65; 2000 U.S. App. LEXIS 11384

April 11, 2000, Argued
May 22, 2000, Decided

Withdrawn from the Bound Volume. Amended Opinion Reported at: 2000 U.S. App. LEXIS 22168.

Appellant appealed from an amended judgment of the United States District Court for the Southern District of New York (Lewis A. Kaplan, Judge) granting appellee's motion for summary judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

GEORGE MOONEY,

Plaintiff,

-against-

CITY OF NEW YORK,

Defendant.

----------x

99 Civ. 0005 (LAK)

ORDER

LEWIS A. KAPLAN, *District Judge.*

Plaintiff was injured while serving as a member of the crew of the Staten Island Ferry, JOHN F. KENNEDY. He applied for and accepted workers' compensation benefits. More than two years later, he brought this action under the Jones Act, 46 U.S.C. § 688, and the general maritime law to recover for personal injuries and maintenance and cure. Defendant moves for summary judgment dismissing the action on the ground that plaintiff's application for and acceptance of workers' compensation waived his Jones Act and general maritime claims as a matter of law.

In *Heagney v. Brooklyn Eastern Dist. Terminal*, 190 F.2d 976 (2d Cir. 1951), *cert. denied*, 342 U.S. 920 (1952), the Second Circuit held that the prosecution of a claim for and acceptance of workers' compensation benefits by an employee covered by the FELA waived his right to federal

remedies in view of the fact that he was represented by counsel and actively pursued the compensation benefits:

> "We agree with the trial judge . . . who was willing to accept plaintiff's own claim that he did not understandingly waive his federal rights before he was represented by counsel, but thought that claim no longer tenable once counsel appeared. When counsel came into the case and conducted its prosecution over many months, with obvious success signalized by increased or additional awards, only to raise this issue at a late date when the end of state compensation was apparently approaching, there should no longer be any possible doubt as to the waiver. If there is ever to be any settlement of legal claims we feel that it must be in a case such as this where a claimant before an administrative board is adequately represented by counsel over a long period, during which the rights, potential and actual, of the client are perfectly obvious to anyone with the slightest legal training, and where there is no suggestion of fraud or concealment from the lawyer on the part of the employer. Hence there was no genuine issue as to the fact of waiver . . ." *Id.* at 978.

Heagney subsequently has been applied in the Jones Act/admiralty context. *Reyes v. Delta Dallas Alpha Corp.*, No. 92 Civ. 4418 (AGS), 1998 WL 635540 (S.D.N.Y. Sept. 16, 1998); *LeRouge v. Frank M. Flower & Sons, Inc.*, No. 91-CV-1327 (TCP), 1992 WL 219825 (E.D.N.Y. Mar. 11, 1992); *Braadt v. City of New York*, 260 F. Supp. 826, 827 (S.D.N.Y. 1966).

The facts in this case, which are entirely undisputed,[1] are at least as strong for the defendant as those in *Heagney*. Here, plaintiff applied for compensation in June 1996. While the City did not controvert compensation, payments, after initially commencing were terminated in December 1996. The Workers' Compensation Board subsequently held five hearings (Jan. 14, May 22 and Dec. 11, 1997 and Apr. 30 and Oct. 15, 1998) on issues including the accident, the causal relation between the claimed injuries and the accident, the extent and permanency of the injury, the need for further treatment, and the rate of compensation. Plaintiff was represented throughout by counsel. He obtained resumption of compensation payments after the initial termination and a further series of awards. He did not institute this action until approximately 26 months after first receiving compensation payments, which ultimately totaled over $16,000. Accordingly, this Court concludes that this case is governed by *Heagney* and its progeny.

Harney v. William M. Moore Bldg. Corp., 359 F.2d 649 (2d Cir. 1966), the principal case relied upon by the plaintiff, is not to the contrary. The plaintiff in that case, so far as the record disclosed, did no more than file an application for and receive automatic, voluntary benefit payments. "The record . . . [did] not disclose any award, let alone a waiver." *Id.* at 652. There was no evidence that the plaintiff was represented by counsel. In consequence, the Circuit, although it cited *Heagney* with approval, *id.* at 652, held that the defense of waiver had not been established,

---

[1] Plaintiff submitted no affidavit or Rule 56.1 Statement. Accordingly, the assertions set forth in defendant's Rule 56.1 Statement are deemed admitted. *E.g. CFTC v. Hanover Trading Corp.*, 34 F. Supp.2d 203, 204 (S.D.N.Y. 1999); *Domino Media, Inc. v. Kranis*, 9 F. Supp.2d 374, 387 & n.81 (S.D.N.Y. 1998) (collecting cases), *aff'd*, 173 F.3d 843 (2d Cir. 1999).

holding "that where the record shows only that plaintiff made a claim and obtained compensation, and the statute is of the automatic, voluntary, type, so that there is no reason to infer than any proceedings or award occurred, plaintiff is not thereby barred from pursuing Jones Act remedies." *Id.* at 653-54.

This case is quite different. As noted previously, plaintiff was represented by counsel, actively litigated the compensation matter, and obtained a series of awards over an extended period. Accordingly, this case is governed by *Heagney,* not *Harney.* Defendant's motion for summary judgment dismissing the complaint is granted.

SO ORDERED.

Dated: August 2, 1999

/s/ Lewis A. Kaplan
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

GEORGE MOONEY,

Plaintiff,

-against-

CITY OF NEW YORK,

Defendant.

----------x

99 Civ. 0005 (LAK)

ORDER

LEWIS A. KAPLAN, *District Judge.*

By order dated August 2, 1999, the Court granted defendant's motion for summary judgment. For reasons that not yet are clear, the only opposition paper then before the Court was plaintiff's memorandum. As plaintiff's counsel subsequently has pointed out, plaintiff also filed a Rule 56.1 statement and affidavits in opposition to the motion. Accordingly, the Court has treated the letter as seeking reconsideration.

Plaintiff was injured while serving as a member of the crew of the Staten Island Ferry, JOHN F. KENNEDY. He applied for and accepted workers' compensation benefits. More than two years later, he brought this action under the Jones Act, 46 U.S.C. § 688, and the general maritime law to recover for personal injuries and maintenance and cure. Defendant moves for summary judgment dismissing the action on the ground that

plaintiff's application for and acceptance of workers' compensation waived his Jones Act and general maritime claims as a matter of law.

In *Heagney v. Brooklyn Eastern Dist. Terminal*, 190 F.2d 976 (2d Cir. 1951), *cert. denied,* 342 U.S. 920 (1952), the Second Circuit held that the prosecution of a claim for and acceptance of workers' compensation benefits by an employee covered by the FELA waived his right to federal remedies in view of the fact that he was represented by counsel and actively pursued the compensation benefits:

> "We agree with the trial judge . . . who was willing to accept plaintiff's own claim that he did not understandingly waive his federal rights before he was represented by counsel, but thought that claim no longer tenable once counsel appeared. When counsel came into the case and conducted its prosecution over many months, with obvious success signalized by increased or additional awards, only to raise this issue at a late date when the end of state compensation was apparently approaching, there should no longer be any possible doubt as to the waiver. If there is ever to be any settlement of legal claims we feel that it must be in a case such as this where a claimant before an administrative board is adequately represented by counsel over a long period, during which the rights, potential and actual, of the client are perfectly obvious to anyone with the slightest legal training, and where there is no suggestion of fraud or concealment from the lawyer on the part of the employer. Hence there was no genuine issue as to the fact of waiver . . ." *Id.* at 978.

Heagney subsequently has been applied in the Jones Act/admiralty context. *Reyes v. Delta Dallas Alpha Corp.*, No. 92 Civ. 4418 (AGS), 1998 WL 635540 (S.D.N.Y. Sept.

16, 1998); *LeRouge v. Frank M. Flower & Sons, Inc.*, No. 91-CV-1327 (TCP), 1992 WL 219825 (E.D.N.Y. Mar. 11, 1992); *Braadt v. City of New York*, 260 F. Supp. 826, 827 (S.D.N.Y. 1966).

The facts in this case are at least as strong for the defendant as those in *Heagney*. Here, plaintiff applied for compensation in June 1996. While the City did not controvert compensation, payments, after initially commencing were terminated in December 1996. The Workers' Compensation Board subsequently held five hearings (Jan. 14, May 22 and Dec. 11, 1997 and Apr. 30 and Oct. 15, 1998) on issues including the accident, the causal relation between the claimed injuries and the accident, the extent and permanency of the injury, the need for further treatment, and the rate of compensation. Plaintiff was represented throughout by counsel. He obtained resumption of compensation payments after the initial termination and a further series of awards. He did not institute this action until approximately 26 months after first receiving compensation payments, which ultimately totaled over $16,000. Accordingly, this Court concludes that this case is governed by *Heagney* and its progeny.

Harney v. William M. Moore Bldg. Corp., 359 F.2d 649 (2d Cir. 1966), the principal case relied upon by the plaintiff, is not to the contrary. The plaintiff in that case, so far as the record disclosed, did no more than file an application for and receive automatic, voluntary benefit payments. "The record . . . [did] not disclose any award, let alone a waiver." *Id.* at 652. There was no evidence that the plaintiff was represented by counsel. In consequence, the Circuit, although it cited *Heagney* with approval, *id.* at 652, held that the defense of waiver had not been established, holding "that where the record shows only that plaintiff made a claim and obtained compensation, and the statute is of the automatic, voluntary, type, so that there is no reason

to infer than any proceedings or award occurred, plaintiff is not thereby barred from pursuing Jones Act remedies." *Id.* at 653-54.

This case is quite different. As noted previously, plaintiff was represented by counsel, actively litigated the compensation matter, and obtained a series of awards over an extended period. Accordingly, this case is governed by *Heagney,* not *Harney.*

Plaintiff's affidavits make essentially two points -- that he subjectively did not intend to waive his right to seek damages under federal maritime law by pursuing his compensation claim and that his counsel in the compensation matter engaged only to pursue that claim. Plaintiff suggests also that he understood that his counsel in the compensation matter limits its practice to such cases (an assertion of which plaintiff has no demonstrated basis of personal knowledge and which is not corroborated by the affidavit of his compensation counsel) and, in any case, that compensation counsel never discussed waiver of any maritime claim plaintiff might have had.

This Court understands *Heagney* as adopting the view, essentially policy-based, that the active pursuit of a worker's compensation claim in which the claimant is represented by counsel waives any maritime tort claim without regard to the subjective understanding and intention of the plaintiff. The Circuit made clear that both it and the district court "accept[ed] plaintiff's own claim that he did not understandingly waive his federal rights, but thought that claim no longer no longer tenable once counsel appeared" -- thus suggesting that the plaintiff there denied any intention knowingly and voluntarily to relinquish his federal rights. Rather, it regarded as controlling the fact that counsel's involvement on plaintiff's behalf in circumstances in which "the rights, potential and actual, of the client are perfectly obvious to anyone with the slightest

legal training" was conclusive as a matter of law. There is nothing in plaintiff's affidavits in this case that takes him out of *Heagney*.

Plaintiff's motion for reconsideration is granted. Upon reconsideration, defendant's motion for summary judgment dismissing the complaint is granted.

SO ORDERED.

Dated: August 25, 1999

/s/Lewis A. Kaplan
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

GEORGE MOONEY,

Plaintiff,

-against-

CITY OF NEW YORK,

Defendant.

----------x

99 **CIVIL** 0005 (LAK)

AMENDED JUDGMENT
FILED AUGUST 31, 1999
ENTERED ON THE DOCKET ON SEPTEMBER 2, 1999

Defendant having moved for summary judgment dismissing the complaint and the matter having come before the Honorable Lewis A. Kaplan, United States District Judge, and the Court on August 2, 1999 having rendered its Order granting defendant's motion for summary judgment dismissing the complaint, and plaintiff having moved for reconsideration and the Court on August 25, 1999 having issued its Order granting plaintiff's motion for reconsideration and upon reconsideration granting defendant's motion for summary judgment dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated August 25, 1999, upon reconsideration, defendant's motion for summary judgment is hereby granted dismissing the complaint.

Dated: New York, New York
August 31, 1999

By: James M. Parkinson
Clerk of the Court

/s/ Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28 day of June, two thousand.

PRESENT:

HON. JON O. NEWMAN,
HON. AMALYA L. KEARSE,
HON. ROBERT A. KATZMANN,
Circuit Judges.

GEORGE MOONEY,
Plaintiff-Appellant,

v.

THE CITY OF NEW YORK,
Defendant-Appellee.

Docket No. 99-9062

FILED JUNE 28, 2000

The petition for rehearing is denied in light of an amended opinion, filed this date.

FOR THE COURT:
ROSEANN B. MacKECHNIE,
CLERK
By: /s/ RALPH A. ANDERSON,
Deputy Clerk
ACTING OPERATIONS
MANAGER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11th day of September two thousand.

Present:

Hon. Jon. O. Newman

Hon. Amalya L. Kearse

Hon. Robert A. Katzmann
CIRCUIT JUDGES,

George Mooney,

Plaintiff-Appellant,

v.

The City of New York,

Defendant-Appellee.

Docket No. 99-9062

FILED SEPTEMBER 11, 2000

A petition for panel rehearing having been filed herein by appellee the City of New York.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk
By: /s/ Beth J. Meador,
Administrative Attorney

[AMENDED OPINION]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: April 11, 2000 Decided: May 22, 2000
As Amended: June 28, 2000)

Docket No. 99-9062

GEORGE MOONEY,

Plaintiff-Appellant,

-v.-

THE CITY OF NEW YORK

Defendant-Appellee.

Before:

NEWMAN, KEARSE, and KATZMANN,

Circuit Judges.

ERRATA

FILED AUGUST 22, 2000

Page	Line	Delete	Insert
2952 (A10)	Fn. 4, line 1	15(v)(3)	15(3)(v)

So Ordered:

/s/ Robert A. Katzmann
U.S. Circuit Judge
August 22, 2000

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: April 11, 2000 Decided: May 22, 2000)

Docket No. 99-9062

GEORGE MOONEY,

Plaintiff-Appellant,

-v.-

THE CITY OF NEW YORK

Defendant-Appellee.

Before:

NEWMAN, KEARSE, and KATZMANN,

Circuit Judges.

Appellant appealed from an amended judgment of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) granting appellee's motion for summary judgment.

Vacated and remanded.

FILED JUNE 2, 2000

ERRATA

Page	Line	Delete	Insert
2944 (A19)	13 (same)	("the City")	
2948 (A23)	4th from bottom (same)	and	and that he
2952 (A27)	6 (11)	Moreover, an	An
2952 (A27)	10 (16)	not	not be
2952 (A27)	25 (31)	could	may
2954 (A29)	16 (22)	worker's	workers'

So Ordered:

/s/ Robert A. Katzmann
U.S. Circuit Judge
June 1, 2000

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
DEC 27 2000
CLERK

(2)

No. 00-872

IN THE

Supreme Court of the United States

NEW YORK, N.Y.,

Petitioner,

v.

GEORGE MOONEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

EDWARD M. KATZ
Counsel of Record
CAPPIELLO, HOFMANN & KATZ, P.C.
Attorneys for Respondent
360 West 31st Street
Suite 1506
New York, New York 10001
(212) 465-8840

164313

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

COUNTER-STATEMENT OF THE QUESTION PRESENTED

By holding that a seaman who files for and receives state workers' compensation benefits will not be found to have waived his federal Jones Act/unseaworthiness remedy unless he/she receives a "final award" which provides substantially more than he/she would receive as maintenance and cure, has the Court of Appeals created an unworkable standard?

REASONS FOR DENYING THE WRIT

The Petitioner, City of New York, seeks review of the Second Circuit Court of Appeals decision because it allegedly creates an "unworkable standard which would eliminate waiver of Jones Act claims by injured maritime workers who received formal New York State Workers' Compensation awards . . ." (Petition for Certiorari, p. i) Certiorari is clearly not warranted in this case.

The Second Circuit properly examined the concept of a "formal award" set forth in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), decided that the finding of waiver would not be formulaic and mandated a further inquiry as to whether the claimant received a substantial benefit in exchange for the alleged waiver of his federal rights. The Court of Appeals held that a "formal award of compensation that gives the claimant no more than payments analogous to maintenance and cure will not be deemed to settle all of the seaman's claims and will not be a bar to a Jones Act suit." (Petition for Certiorari, pp. A14-15) It further held that "a complainant's receipt of a formal award constitutes a waiver of his or her federal maritime claims only if the formal award settled the complainant's claims in their entirety." (Petition for Certiorari, p. A14) These holdings are in accord with well established principles of waiver. Thus, an award or "formal award" that only provides what the seaman is entitled to, i.e. maintenance and cure or its equivalent, cannot not be viewed as a waiver of federal maritime rights.

In *Garrett v. Moore-McCormack Lines, Inc.*, 317 U.S. 239 (1942) this Court held that one asserting a waiver of rights by a seaman bears the burden of proving that the release "was executed freely, without deception or coercion, and that it was made by the seaman with a full understanding of his rights." (317 U.S. at 246). Subsequent Circuit Court decisions

establish that there must be adequate compensation paid for a waiver, i.e., *Resner v. Arctic Orion Fisheries,* 83 F.3d 271 (9th Cir. 1996) and that the burden of proof becomes very heavy when the consideration for the waiver of rights is inadequate, i.e., *Davis v. American Commercial Lines*, 823 F.2d 1006, 1008 (6th Cir. 1987), *cert. denied*, 474 U.S. 1067 (1988). The Court of Appeals decision in *Mooney* is essentially a restatement of prevailing law which does not warrant review by this Court.

Gizoni, supra, Reyes v. Delta Dallas Alpha Corp., 199 F.3d 626 (2d Cir. 1999) and *Mooney* stand for the principal that an employer alleging a waiver of federal rights by a maritime employee must prove an unequivocal waiver. New York law does not differ. Before a New York court will find a waiver of a seaman's federal rights, the waiver must be "express", *Pedersen v. Manotowec Co.*, 25 N.Y.2d 412, 306 N.Y.S.2d 903 (1969) and "unequivocal", *Dacus v. Spin-nes Realty & Constr. Co.*, 22 N.Y.2d 427, 431, 293 N.Y.S.2d 83 (1968). These cases do not provide a windfall for the seaman, nor do they permit double recovery because the New York's Workers' Compensation Law and the LHWCA provide for liens and set-offs of previously received benefits in excess of maintenance and cure.

The City's assertion that the "Second Circuit's holding has improperly preempted state law by rendering the waiver provision of Section 113 of the New York State Workers' Compensation Law meaningless" (Petition for Certiorari, p. 14) is untrue. The City, like any maritime employer, can decline to provide workers' compensation benefits to an injured seaman since New York's Workers' Compensation Law does not cover injuries on the water. Section 113 provides for mutual waiver. The City may elect to pay compensation benefits and the seaman, having been advised of his federal maritime rights, may explicitly waive these

rights and choose to receive compensation. Such a waiver would be enforceable as long as the compensation benefits exceed the sum which would otherwise have been owing as maintenance and cure. Had the City here obtained such an explicit waiver, it would have avoided the problems presented in this lawsuit.

The City also alleges that the Second Circuit's decision makes employers who provide compensation benefits to seamen "vulnerable" to tort lawsuits even after a "formal award." To the extent that the "formal award" fails to provide the seaman with payments which exceed maintenance and cure to which he was entitled regardless of fault, the employer should be "vulnerable" to a tort lawsuit as there was no *quid pro quo* for the asserted waiver of federal rights.

The City asserts that the Compensation Board will now be called upon to "determine the merits of tort actions . . ." (Petition for Certiorari, p. 15) This is fallacious. *Mooney* does not require the Board to do anything. Rather, it requires courts, in weighing the issue of waiver of federal rights, to examine the *quid pro quo,* i.e., whether the seaman received something in addition to what he/she was entitled to receive as maintenance and cure. This inquiry is one of the factors to be considered, along with others set forth in the *Mooney* decision (Petition for Certiorari, p. A15) in determining whether the claimant expressly, impliedly and unequivocally waived his federal maritime rights.

There is no valid reason for this Court to grant certiorari in this case.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable court deny the Petition.

Respectfully submitted,

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